Supreme Court, U. S.
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No. 76-432

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

RENA B. WHITE
BEATRICE RICE
MYN CLEARY
GWENDOLYN LANDENBERGER
FRANCES W. KENNEDY

Petitioners,

v.

ARTHUR MURRAY, INC.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF UTAH

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I N D E X

Citations

Cases:

Statutes:

Articles:

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Rena B. White, Beatrice Rice, Myn Cleary, Gwendolyn Landenberger and Frances W. Kennedy, petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of Utah entered in this case May 5, 1976, (Rehearing denied June 28, 1976) affirming the judgment of the District Court of Utah, Third Judicial

District, that it did not have personal jurisdiction over Arthur Murray, Inc. under Utah Statutes (Utah Code 38-27-22 to 78-27-24).

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah (App. A, infra pp.10-15) is reported in 549 P. 2d 439 (May 5, 1976).

The District Court's Order, Judgment and Decree quashing the service of summons on Arthur Murray, Inc. and dismissing petitioners' complaints (App. B, infra pp. 16-18) is unreported.

JURISDICTION

The decision of the Supreme Court of Utah was entered May 5, 1976. On May 20, 1976, petitioners were granted extention of time for filing a Petition for Rehearing to June 24, 1976, pursuant to Rule 76(f) Utah Rules of Civil Procedure. On June 24, 1976, a Petition for Rehearing was duly filed pursuant to Rule 76(e) Utah Rules of Civil Procedure.

We invoke the jurisdiction of the Supreme Court under 28 USC 1257(3) and 28 USC 2101(c).

CONSTITUTIONAL PRIVILEGE INVOLVED

The Due Process clause of Section 1, Amendment XIV to the Constitution of the United States.

QUESTION PRESENTED

Whether the Supreme Court of Utah denied petitioners due process of law when it affirmed the decision of the lower court quashing service of summons on Arthur Murray, Inc. and dismissing petitioners' complaints in the face of Utah Statutes providing jurisdiction of Utah's courts "over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution" (Utah Code 78-27-22 to 78-27-24) (App. C, infra, pp. 19-20).

STATEMENT

The constitutional question of the right of petitioners under the due process clause of Amendment Fourteen to assert jurisdiction over Arthur Murray, Inc. in Utah's courts was presented at every stage of the proceeding.

The complaints of petitioners (identical in pertinent parts) allege fraudulent, pretensive and coersive conduct of Arthur

Murray, Inc. in the sale of courses of dancing instruction to the petitioners and prays for damages for same. The complaints allege that Arthur Murray, Inc. supervised, controlled and directed, and participated in this conduct, and by such conduct subjected itself to jurisdiction of the District Court of Utah under Utah's so-called "long arm statutes" (78-27-22 to 78-27-24).

Utah Statutes (78-27-22 to 78-27-24 Utah Code) in pertinent part provides for jurisdiction of Utah courts over non-residents, if non-residents transact any business in the state or contracts to supply services or goods in the state (78-27-24). The Legislative mandate is that the statutes "should be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

After due service of process on Arthur Murray, Inc., and on December 9, 1974, Arthur Murray, Inc. moved to quash service of summons on the grounds that it was a Delaware corporation with its principal place of business at Coral Gables, Florida, and had never done business in Utah and was

not doing business in Utah at the time and that it did not have an office, agent or employee within Utah, and that the court lacks jurisdiction over Arthur Murray, Inc.

On June 27, 1975, hearing was had on the Motion. At the hearing (and on the Hearing for Motion for New Trial on September 11, 1975) the following uncontradicted contacts between Arthur Murray, Inc. and its Salt Lake City franchise dance studio were shown by deposition and affidavits:

1. Arthur Murray, Inc. specifically directed its Salt Lake City dance studio in its fraudulent and coersive sales of dancing lessons to petitioners, including such minute directions as telling them:

"a. What to say.
b. How to say it.
c. When to say it.
d. How to overcome or reply to negative statements.
e. When to say nothing.
f. When to change the subject."

2. Arthur Murray, Inc.'s representative regularly visited its Salt Lake City studio to sign and approve certificates of awards to petitioners. There were many such awards and all petitioners received

some. A representative of Arthur Murray, Inc. regularly visited its Salt Lake City studio to supervise and control the sales of courses of dancing instruction.

3. Arthur Murray, Inc. directed its Salt Lake City studio in the sale of loss leader sales to entrap customers. It supplied the instructions and the advertisements and they were followed by the Salt Lake studio.

4. Arthur Murray, Inc. exercised overriding control of all activities of the Salt Lake studio. Arthur Murray, Inc.'s franchise agreement with its Salt Lake studio provided for tight control.

Arthur Murray, Inc. did not profer one iota of evidence contradicting these contacts (indeed, control) of its Salt Lake dance studio; nor any evidence whatsoever at the hearings.

Pursuant to subdivision 2 or Rule 21, Rules of the Supreme Court of the United States, we are requesting the District Court of Utah (the court possessed of the record) to transmit all evidence adduced at the District Court hearings relating to contracts between Arthur Murray, Inc. and its Salt Lake City franchised dance studio,

namely:

Deposition of Paul Curry
Affidavit of Marie LaTour
Arthur Murray Executive Manuel
Arthur Murray Franchise Agreements
Affidavit of Petitioners

The denial of due process to petitioners by the Supreme Court of Utah's affirmance of the lower court's judgment, quashing service of summons and dismissing the complaints, was raised by petitioners in their "Brief of Appellants" (filed December 2, 1975), Appellants Reply Brief "C" (filed March 19, 1976), and Petition for Rehearing (filed June 24, 1976) in the Supreme Court of Utah.

REASONS FOR GRANTING THE WRIT

The refusal of the Supreme Court of Utah to apply the due process clause of the Fourteenth Amendment, denies the benefits of said amendment to every person in the State of Utah.

The hostility of the Supreme Court of Utah to the Fourteenth Amendment is demonstrated in State v. Phillips 540 P. 2d 936 (Utah 1975) wherein the court challenges the validity of the adoption of the amendment.

We believe that issue presented by this petition is the most unique in decades.

Edwin Brown Firmage, Esq., professor of Law, University of Utah, in his Law Review article "The Utah Supreme Court and the Rule of Law: Phillips and the Bill of Rights in Utah", points out that the Utah Supreme Court in Phillips is denying to the people of Utah the benefits of the due process clause of the Fourteenth Amendment.

"...the Utah Supreme Court defied or demonstrated ignorance of over half a centurn of United States Supreme Court case law, holding to the contrary."[1]

The Utah Supreme Court's denial of the due process clause of the Fourteenth Amendment in the instant cases is even more aggravated than in Phillips.

For here, the Supreme Court of Utah;

1. Turns its back on this court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945) pronouncing the minimum contacts doctrine of due process.

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[1] Utah Law Review, Vol. 1975, Fall, Number 3, p. 593.

2. Turns its back on the mandate of Utah's Legislature that Utah's Courts apply the minimum contacts doctrine "to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution" (Utah Code 78-27-27).

3. Turns its back on the uncontradicted evidence in this case showing contacts between Arthur Murray, Inc. and its Salt Lake City franchise, far beyond the requirements of the minimum contacts doctrine.

4. Turns your petitioners out of court in their actions alleging the sordid fraudulent practices of franchisers of dance studios that have become a national scandal.[2]

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

William H. Henderson

WILLIAM H. HENDERSON
Attorney for Petitioners

Joseph C. Fratto

Joseph C. Fratto
Of Counsel

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[2] "After the Ball", Wall Street Journal Pacific Coast Ed., March 10, 1972 (pertinent parts quoted in App. D, infra, pp 21-22).

APPENDIX A

THE SUPREME COURT OF THE STATE OF UTAH

Nos. 14286
14287
14288
14289
14290

RENA B. WHITE, et al
Plaintiffs and Appellants

v.

ARTHUR MURRAY, INC.
Defendant and Respondent

[May 5, 1976]

TUCKETT, Justice:

The plaintiffs appeal from an order of the district court dismissing their complaints on the ground that the court had not acquired jurisdiction over the defendant. While the plaintiffs filed separate complaints, each alleging cause of action for fraud against the defendant, the ruling complained of by the district court is common to each case and is dealt with here as though it were one appeal. Plaintiffs

are residents of Salt Lake County and filed their separate complaints in the District Court of Salt Lake County and caused service of summons to be made upon the defendant in the state of Florida. Defendant is a corporation organized and existing under the laws of the state of Delaware with its peincipal office and place of business in Coral Gables, Florida.

After the service of summonses and copies of the complaints upon the defendant in the state of Florida, the defendant appeared specially to move the court to dismiss the complaints on the ground and for the reason that the court had not acquired jurisdiction over the defendant.

After a hearing on the motion, the court below found that the defendant has never qualified to do business in the state of Utah, nor has it ever done business in this state. The court further found that an Arthur Murray Dance Studio was operated in Salt Lake City, Utah, but that the studio was operated by a franchisee of the defendant, and except for isolated visits by auditors of the defendant, Arthur Murray, Inc., has not maintained an office in, done business in, had an agent, employee or

officer or other representative in the state of Utah, neither before, during or since the times referred to in plaintiffs' complaints. The court granted the defendant's motion to quash the service of summons served on behalf of each of the plaintiffs. During the times mentioned in the plaintiffs' complaints an Arthur Murray Dance Studio was operated in Salt Lake City and was in fact operated by a franchisee or franchisees who were not made parties to these proceedings. The contract entered into by the franchisee and the defendant contains the following pertinent language:

(a) The franchisee will include provision in each enrollment agreement or contract entered into with a student relating to the taking of dancing lessons or the payment therefore substantially as follows: This agreement is made by student with the franchised owner of the studio in which he or she is enrolling and said franchisee is solely responsible for the performance of this contract and the dancing lessons provided for herein. As student, I understand and agree that this contract is made by me solely with the above

studio, as seller and does not directly or indirectly constitute an agreement with or an obligation of Arthur Murray, Inc., or any of its employees.

* * * *

(c) Franchisee agrees to use at all times the words "a franchised studio" whenever "Arthur Murray Studio", "Arthur Murray Dance Studio", "Arthur Murray School of Dancing", or any variation thereof is used in the franchisee's advertising or printed matter. The franchisee agrees to use in his appointment cards, receipts, etc., wherever the name "Arthur Murray" appears, the phrase "Arthur Murray Dance Studio," _____ "franchisee," (the blank to be filled in with the franchisee's name).

(d) The franchisee will immediately have the phrase "Arthur Murray Dance Studio" _____ "owner and franchisee" (the blank to be filled in with the franchisee's name) painted on the outer door of entrance to the franchisee's studio or studios.

The defendant did furnish to the franchisee instructional material, various forms

of advertising and promotional materials, including dance competitions. For its services the defendant charged the franchisee a percentage of the income received from students who paid for dancing instruction. Auditors from the defendant's office checked the books of the franchisee on an annual or biannual basis to determine whether the defendant was receiving the agreed percentage. The defendant carried on no other activity in the state of Utah, not did it supervise or engage in the management of the dance studio.

In order for the Utah court to acquire jurisdiction over the defendant it could only be accomplished on the basis of Section 78-27-24, U.C.A. 1953, which provides in part as follows:

> Any person . . .whether or not a citizen or a resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;

> (2) Contacting to supply services or goods in this state;
>
> (3) The causing of any injury within this state whether tortious or by breach of warranty; . . . .

The activity of the defendant in this State does not meet the requirements of the above section which has been construed and dealt with in a number of decisions by this court.[1]

We are of the opinion that the devision of the district court in determining that it had not acquired jurisdiction over the defendant is amply supported by the record, and the decision is affirmed. Defendant is entitled to costs.

WE CONCUR:

F. Henri Henriod,
Chief Justice

J. Allan Crockett,
Justice

A. H. Ellett, Justice

MAUGHAN, Justice, concurs in the result.

1. Durham-Bush, Inc. v. Bill Hartmann Plumbing & Heating, Inc., 30 Utah 2d 177, 515 P. 2d 92; Foreign Study League v. Holland-America Line, 27 Utah 2d 442, 497 P. 244; Hill v. Zale Corporation, 25 Utah 2d 357, 482 P. 2d 332; Union Ski Company v. Union Plastics Corp., No. 14065, ___ P. 2d _____.

APPENDIX B

THE DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

Nos. 222923
222924
222925
222926
222927

RENA B. WHITE, et al
Plaintiffs

v.

ARTHUR MURRAY, INC.
Defendant

ORDER

The motion of Arthur Murray, Inc., to quash service of summons, having come on regularly for hearing on the 27th day of June, 1975, at the hour of 2:00 p.m. before the Honorable Stewart M. Hanson, Sr., with William Henderson appearing on behalf of the plaintiffs, and Philip R. Fishler appearing on behalf of the defendant, and the above entitled matters having been consolidated for purposes of this hearing, the Court after hearing arguments of counsel and being fully advised finds as follows:

1. Arthur Murray, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its principle place of business in Coral Gables, Florida. Arthur Murray, Inc. has never qualified to do business nor has it ever done business in the State of Utah.

2. That during the time periods referred to in plaintiffs' complaint, an Arthur Murray dance studio was operated in Salt Lake City, Utah, but that at all times referred to in plaintiffs' complaint, said dance studio was operated by a franchisee of Arthur Murray, Inc. and that but for isolated visits into the State of Utah by the auditors of Arthur Murray, Inc., Arthur Murray, Inc has not maintained an office in, done business in, had an agent, employee or officer or other representative in the State of Utah either before, during or since the time periods referred to in plaintiffs' complaint.

NOW THEREFORE, upon motion of the defendant, Arthur Murray, Inc.:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

The motion of Arthur Murray, Inc., to quash the service of the summons of each

plaintiff be and is hereby granted, and further that each of the plaintiff's complaints is hereby dismissed.

Dated this 11th day of July, 1975.

BY THE COURT

Stewart M. Hanson, Sr.
Judge

APPENDIX C

Relevant Provisions

UTAH CODE

78-27-22 to 78-27-24

78-27-22. Jurisdiction over non-residents--Purpose of act.--It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment

to the United States Constitution.

78-27-23. Jurisdiction over nonresidents --Definitions.--As used in the act:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in the state which affect persons or businesses within the state of Utah.

78-27-24. Jurisdiction over nonresidents --Acts submitting person to jurisdiction.--Any person, not withstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty; . . . .

APPENDIX D

The Wall Street Journal
Pacific Coast Edition
(Excerpt)

AFTER THE BALL

Many Irate Consumers Assail Selling Tactics of Dance Instructors

---

Critics Claim Some Studios Exploit Ulterior Motives Of Pupils For Big Profits

---

'Gigolos & Rich Old Ladies'

...In and out of court, a growing number of angry consumers are claiming that they have been bilked by dance studios. And these complaints have created considerable concern in the offices of various regulatory authorities, including the Federal Trade Commission.

The so-called dance-studio game is by no means a new problem for the FTC. More than a decade ago, stories about dance school swindles--in which light-footed, money-hungry entrepreneurs prey upon the lonely and the aged--were splashed across the front pages of the nation's newspapers, and the FTC moved in on some of them. As the headlines faded, however, the swindlers waltzed on.

"They never did even slow up", says an FTC attorney. "They've just gone around and around and around."

The two largest studio chains, Arthur Murray, Inc. and the Fred Astaire organization, vehemently deny any intentional wrongdoing--although they concede the possibility of exploitation is omnipresent. "The nature of the business leads itself to exploitation, and we try to limit it," says Chester F. Casanave, head of the Astaire organization. "Ninety percent of the schools in the country are well run and well operated, and the organization highly resents those people who don't take care of the store."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 22, 1976, he deposited in the mail in a United States Post Office, first class postage prepaid, addressed to Strong & Hanni, Counsel of Record for Arthur Murray, Inc., at their post office address, three copies of the foregoing Petition For Writ of Certiorari.

William H. Henderson

WILLIAM H. HENDERSON
Attorney for Petitioners

Supreme Court, U. S.
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Petitioners,

vs.

ARTHUR MURRAY, INC.

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Utah

BRIEF FOR RESPONDENT ARTHUR MURRAY, INC. IN OPPOSITION

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Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Utah

BRIEF FOR RESPONDENT ARTHUR MURRAY, INC. IN OPPOSITION

STATEMENT OF THE CASE

The Petitioners herein seek review of a decision by the Supreme Court of the State of Utah entered on May 5, 1976, on which a rehearing was denied on June 28, 1976, and which is reported at 549 P.2d 439. The decision of the Supreme Court of Utah affirmed the order of the District Court of Salt Lake County, which is unreported, granting the motion of the Respondent, Arthur Murray, Inc. (AMI) to quash the service of the summons of each plaintiff on the ground that AMI was not subject to the jurisdiction

of the State Courts of Utah under the applicable Utah Statute, which is 78-27-24, U.C.A. 1953 as amended.*

The Petitioners filed complaints in the District Court of Salt Lake County, State of Utah, claiming that the defendant and Respondent, AMI, supervised, directed and controlled its franchisee in Salt Lake City, Utah, in a course of fraudulent representation and conduct. The complaints were served, together with summonses, upon Respondent AMI at its offices in Dade County, Florida. Thereafter, the Respondent filed its motions to quash on the ground that the Respondent has never done business in the State of Utah, nor did it have offices, employees or agents within the State of Utah at any time prior to, during or since the events complained of by the Petitioners, and that, therefore, the Respondent would not be subject to the jurisdiction of the Courts of Utah. The Respondent is a Delaware Corporation, with its principal place of business at Coral Gables, Florida.

As stated above, the District Court of Salt Lake County granted Respondent's motion to quash, and this decision was affirmed by the Utah Supreme Court.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c). AMI contends, however, that this Court is without juris-

*78-27-24 U.C.A. 1953 provides in pertinent part:

Jurisdiction over nonresidents — Acts submitting person to jurisdiction. — Any person, notwithstanding Section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty; . . . .

diction because the Petitioners did not raise and the courts of Utah have never passed upon the question which Petitioners seek to present here.

QUESTION PRESENTED

Did the Supreme Court of Utah deny Petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when it affirmed the dismissal of Petitioners' State Court action against AMI and construed Utah's "Long-Arm Statute" more narrowly than Petitioners believed proper.

ARGUMENT

The District Court of Salt Lake County upon AMI's motion to dismiss determined that AMI had insufficient contacts with the State of Utah to subject it to the jurisdiction of the Utah courts under Utah's "Long-Arm Statute," which is 78-27-24 U.C.A. 1953 as amended. In affirming the decision of the trial court, the Utah Supreme Court held that the District Court properly interpreted the Statute and that the trial court's decision was amply supported by the evidence and the record below.

Petitioners now seek from this Court a trial de novo of the facts underlying the District Court's order and a decision overruling the Utah Supreme Court's interpretation of Utah's "Long-Arm Statute." The federal constitutional question, which Petitioners now seek to raise for the first time in this Court, is insubstantial at best and, in any event, Petitioners waived any such argument by failing to raise it either before the trial court or the Supreme Court of Utah.

POINT I.

PETITIONERS WAIVED THEIR CLAIM BY FAILING TO ASSERT IT IN THE COURTS BELOW.

Although Petitioners state in conclusory fashion that they argued before the Supreme Court of Utah that affirmance of the lower court's judgment dismissing the complaints were denied due process, the Utah Supreme Court's opinion clearly shows that the Court neither considered nor decided this question, and further petitioners' briefs to the Utah Supreme Court reveal that the question was never raised.*

Before the Utah Supreme Court the Petitioners argued that the Due Process Clause of the Fourteenth Amendment as interpreted by this Court allows for the broad application of Utah's "Long-Arm Statute." Petitioners further argued that the preamble to the "Long-Arm Statute"** indicates an intent by the Utah legislature that the statute be broadly interpreted so as to confer jurisdiction over the Respondent in this case. The Utah Supreme Court said nothing about the Fourteenth Amendment in its decision, but instead relied upon prior rulings defining the scope of the "Long-Arm Statute."

If Petitioners are, in fact, urging that this Court hold that the Utah Supreme Court misinterpreted or misapplied the Utah statute in question, then they are asserting no federal claim whatsoever.

---

*Petitioners apparently have not obtained a certificate from the Utah Supreme Court stating that the question they seek to present here was raised and decided.

**78-27-22 U.C.A., 1953, states in part:

"The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution."

It is a well settled principle of law that the Supreme Court cannot entertain a federal question not raised in the State court below nor actually decided by the lower court. The Supreme Court itself has stated on numerous occasions that it will not pass upon a contention as to a State violation of federal constitutional rights or upon any federal question where the issue is neither raised nor considered by the State courts. See *Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793, 66 S. Ct. 663 (1946); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 90 L.Ed. 607, 66 S. Ct. 511 (1946).

In *Nelson v. County of Los Angeles*, 362 U.S. 1, 4 L.Ed. 2d 494, 80 S. Ct. 527 (1960), this Court considered several federal and constitutional questions, all but one of which were raised in the State courts below. The Court made the following determination on the basis that the Petitioners failed to raise the issue in the lower courts and in doing so stated as follows:

> We do not pass upon petitioner's contention as to the privileges and immunities clause of the 14th Amendment, since it was neither raised in nor considered by the California courts. 362 U.S. 9, 4 L. Ed.2d 500.

Similarly, in *Beck v. Washington*, 369 U.S. 541, 8 L. Ed.2d 98, 82 S. Ct. 955 (1962), the petitioner contended that the Washington State statute permitting persons in custody to challenge grand jurors denied equal protection to persons who were not in custody and investigated by grand juries. The Court refused to consider this question on the basis that it had not been raised and considered in the Washington State courts below:

> This point is not properly before this court. Although both opinions of the Washington Supreme Court discussed the interpretation of Section 10.28.030, neither considered that question in light of the Equal Protection argument for that argu-

ment was never properly presented to the court in relation to this Statute. 369 U.S. 549, 550, 8 L. Ed.2d 107.

The Petitioners' contention in the instant case, that they have been denied due process of law under the Fourteenth Amendment, by a refusal of the Utah courts to grant jurisdiction over the Respondent in Utah, was never raised or considered at the Utah Supreme Court. There is nothing contained in the Petitioners' brief on appeal, or in the brief on petition for rehearing to the Utah Supreme Court that alleges that the Petitioners are or will be denied due process of law if jurisdiction is not granted over the Respondents. Neither is the federal question of a denial of due process to the Petitioners mentioned anywhere in the official opinion of the Utah Supreme Court reported in 549 P.2d 439 (1976). In *Street v. New York*, 394 U.S. 576, 22 L. Ed.2d 572, 89 S. Ct. 1354 (1969), the Supreme Court held that a failure of the State court to pass upon the federal question presented the assumption that it was not raised or presented in the State courts:

> If the question was not so presented, then we have no power to consider it. [Citations omitted.] Moreover, this court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary. See *E.G., Bailee v. Anderson*, Supra; *Chicago, I.&L.R. Co. v. McGuire*, 196 U.S. 128, 131-133, 49 L. Ed. 413, 415, 417, 25 S. Ct. 200 (1905). 394 U.S. 582, 22 L. Ed.2d 579.

Since there is nothing in the Utah Supreme Court opinion, or elsewhere in the record indicating that the Petitioners presented the issue that they were being denied

due process of law under the Fourteenth Amendment, this Court cannot consider this federal issue and, therefore, the Writ of Certiorari should be denied.

POINT II

THE UTAH SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE UTAH "LONG-ARM STATUTE," 78-27-22 through 78-27-24 U.C.A. 1953 as amended, DID NOT DEPRIVE PETITIONERS OF DUE PROCESS OF THE LAW.

Petitioners state that the Supreme Court of Utah denied them due process of law when it affirmed the decision of the lower court, quashing the service of the summons on AMI and dismissing Petitioners' complaints. As authority for the basis of this due process allegation, the Petitioners cite language from the Utah "Long-Arm Statute," 78-27-22 U.C.A., 1953, as amended, which provides that jurisdiction should be asserted as broadly as possible over non-resident defendants but not so broadly as to violate the due process clause of the Fourteenth Amendment.

A careful reading of this statutory language and reference to the United States Supreme Court opinions indicate that the purpose of the "Long-Arm Statutes" in Utah and elsewhere is to provide for personal jurisdiction over defendants to the extent that the *defendants* are not deprived of due process of law by such a jurisdictional reach. The Petitioners have misconstrued the statutory language as somehow providing that a denial of jurisdiction over the defendants by the court can be a deprivation of due process to the plaintiff, who has chosen the forum in which to sue. Petitioners, however, fail to present to the Court how the interpretation and application of the Utah "Long-Arm Statute" denying jurisdiction over the Respondent

in any way denied due process of law to the Petitioners. Conversely, if the Utah courts had granted jurisdiction over the Respondent in the instant case, it may well have been a denial of due process to the Respondent as it would have presented an unreasonable burden upon the Respondent to defend the action in Utah. This protection extended to *defendants* has often been recognized as a proper safeguard. In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), this Court recognized the need to insure the due process protection to be accorded a defendant and applied the "minimum contacts" doctrine. In so doing, the Court stated:

> Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in its state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. [Citations omitted.] To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process. 326 U.S. 317, 90 L. Ed. 102, 103.

The Respondent submits that the State of Utah could repeal its "Long-Arm Statute" altogether without affecting the rights of the citizens under the Fourteenth Amendment of the United States Constitution. The mere reference to the United States Constitution in a State statute does not create federal constitutional issues in the interpretation and application of that statute by a State Supreme Court.

The Utah Supreme Court itself has stated in a case cited by the Petitioners in all the proceedings below that

the due process protections afforded in the purpose of the Utah "Long-Arm Statute" are for the protection of the defendants. In *Hill v. Zale Corporation*, 25 Utah 2d 357, 482 P.2d 332 (1971), the court stated:

> It is appreciated that the language just quoted is necessarily broad sounding generality; and that it must be so interpreted and applied as to conform with basic concepts of fairness and due process of law. This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this state or may be purchased and sold by others therein. 25 Utah 2d 359.

Having failed to present any arguments as to how the Petitioners have been denied due process of law under the Fourteenth Amendment, the Petitioners then cite *State v. Phillips*, 540 P.2d 936 (Utah, 1975), as authority for the contention that the Utah Supreme Court does not recognize or apply the Fourteenth Amendment to the United States Constitution, and by referring to this case the Petitioners somehow imply that they have been denied the protections of the Fourteenth Amendment by the Utah Supreme Court in the instant case. It goes without saying, however, that the Petitioners' reference to *State v. Phillips*, Supra, is misplaced and irrelevant to the instant case. Petitioners have not demonstrated how the Utah Supreme Court in the instant case has in any way ignored or abridged the Fourteenth Amendment or denied the Petitioners due process of law by denying personal jurisdiction over the Respondents. On the contrary, the Utah court seems to recognize and apply the Fourteenth Amendment protections of due process by refusing to grant jurisdiction over the Respondents because of the lack of sufficient minimum contacts to present a valid basis for jurisdiction.

The Petitioners are not alleging that the Utah "Long-Arm Statute" is in any way repugnant to the Constitution

or the federal laws, but are merely contending that the Supreme Court of Utah misinterpreted or misapplied the Utah Statute to the facts of the instant case. Such a contention does not demonstrate a denial of due process to the Petitioners. In *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 61 L. Ed. 644, 37 S. Ct. 318 (1917), the Court made a general statement as to why a similar claim was not a valid basis for alleging a deprivation of due process of law:

> The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State, and thereby infringed the due process and equal protection clause of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the State courts upon questions of state law. *Sayward v. Denny*, 158 U.S. 180, 186, 39 L. Ed. 941, 943, 15 S. Ct. 777; *Central Land Co. v. Laidley*, 159 U.S. 103, 112, 40 L. Ed. 91, 94, 17 S. Ct. 80; *Castillo v. McConnico*, 168 U.S. 674, 683, 684, 42 L. Ed. 622, 625, 626, 18 S. Ct. 229. The question presented, other than those relating to the validity of the State Boards adjudication, all turned exclusively upon the law of the state, and the state court's decisions of them is controlling. 243 U.S. 165, 166, 61 L. Ed. 649.

CONCLUSION

The Petitioners' claim of a denial of due process of law under the Fourteenth Amendment was never presented or considered in the Utah Courts below, and consequently, cannot and should not be considered by the United States Supreme Court. Since the only federal question addressed in the petition for a Writ of Certiorari is the denial of due process to the Petitioners, the Writ should be denied on

the basis that the federal question was never presented in the lower court proceedings below.

Furthermore, the Petitioners have misconstrued and misapplied the statutory language of the Utah "Long-Arm Statute," Utah Code 78-27-22, referring to providing jurisdiction over the defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment, as somehow providing due process protections to the plaintiff, or the Petitioners in the instant action. It is uncontradicted that the statutory language referring to the due process clause of the Fourteenth Amendment is designed to insure protections for the defendant and not for the plaintiffs who initiate the actions and bring suit in the forum of their choice. Due process protections in the "minimum contacts" doctrine and the Utah "Long-Arm Statute" insure that jurisdiction cannot be granted over defendants when the contacts of the defendant are not sufficient enough to require the defendant to come in and defend in the plaintiff's choice of forum. The Petitioners have not demonstrated how the Utah court's interpretation and application of the Utah "Long-Arm Statute" presents a due process claim for the Petitioners. Such a State court's interpretation and application of its own State laws, as in the instant case, have been recognized by the United States Supreme Court as not presenting a due process question.

For the foregoing reasons, the Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

STRONG & HANNI

By .....

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Respondent's Brief in Opposition were mailed to William H. Henderson and Joseph C. Fratto, Attorneys for Petitioners, at their offices at 104 John Hancock Building, 455 South Third East, Salt Lake City, Utah 84111, in a postage prepaid properly addressed envelope on the 9th day of November, 1976, and that the above are all of the parties required to be served.